

March 12, 2004

Via E-Mail: [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov)

Ms. Jennifer J. Johnson  
Secretary  
Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, N.W.  
Washington, DC 20551

Re: Regulation CC, Proposed Rule, Docket No. R-1176

Dear Ms. Johnson:

Bank One Corporation ("Bank One") is pleased to provide the following comments on the Federal Reserve Board's ("Board") proposed amendments to Regulation CC that would add a new Subpart D, with commentary, to implement the Check Clearing for the 21<sup>st</sup> Century Act (the "Check 21 Act") and to clarify other existing provisions of the rule and commentary (the "proposed rule").

In addition to this letter, Bank One agrees with and supports the comment letter submitted jointly by several financial services industry organizations and technology companies, including Bank One (the "Industry Letter"), the comment letter submitted by The Clearing House and the comment letter submitted by the Electronic Check Clearing House Organization ("ECCHO").

Set forth below are Bank One's responses to the Federal Reserve Board's specific requests for comment. Also, at the end of the letter, Bank One has included several additional comments.

**The Board particularly Requests Comment on the proposed commentary to the substitute check definition that describes the various ways in which the MICR line of a substitute check can vary from the MICR line of the original check.**

Bank One agrees with the position set forth in the Industry Letter and recommends that the Board adopt a final rule that clarifies that in all cases, that a substitute check retains its legal equivalence to the original check, provided the reconverting bank placed a MICR line on the substitute check in MICR ink. If the legal equivalency of the substitute check were not maintained, collecting banks and paying banks would have no authority to handle the purported substitute check or charge the drawer's account as they would in the ordinary course of processing, even if the original check were authorized. Generally, as a result of such a rule, a paying or collecting bank receiving an item would not be able to identify whether or not an item constitutes a substitute check, so it would have no certainty in its ability to process items in an automated fashion. Such uncertainty is

contrary to a main goal of the Check 21 Act, to encourage the acceptance and collection of substitute checks.

If there were an irregularity in the MICR line, the parties to a transaction would be better protected against resulting losses with legal equivalency than they would if the item did not retain the legal equivalency. In the event the MICR line includes information that does not match the MICR line on the original check, the reconverting bank would have failed to comply with provisions of the rule, which require the substitute check to bear a MICR line containing all of the information appearing on the MICR line of the original check and be suitable for automated processing, but would not have breached the warranties because the substitute check would have an image that accurately represents all of the information on the front and back of the original check and bear the legend. In addition, in the event the MICR line includes information that is not correct, the reconverting bank would have breached the encoding warranties under Regulation CC and the UCC, which provide that a bank warrants that information encoded after issuance in magnetic ink on the check or returned check is correct.

Similarly, if a reconverting bank or a bank repairing a substitute check were to fail to correctly place a required digit in position 44 in compliance with the generally applicable industry standards, that failure would constitute a violation of the Check 21 Act or proposed rule but should not affect the status of the substitute check as the legal equivalent of the original check or constitute a breach of the Check 21 Act warranties.

Bank One recognizes that maintaining the legal equivalence of these items without a breach of the Check 21 Act warranties could have consequences for subsequent collecting or returning banks. We believe this liability would be best handled as described in the Industry Letter.

**The Board Requests Comment on what benefits, if any, there would be in providing returning banks with the flexibility to indorse on the front of checks and to include additional information in their indorsements.**

Bank One supports the Board's proposal to amend appendix D to require returning bank indorsers to apply their indorsement to the back of a check and include only (1) the bank's nine-digit routing number, and, if the returning bank is a reconverting bank with respect to the check, an asterisk at each end of the number to identify the bank as a reconverting bank, (2) the indorsement date, and (3) an optional trace or sequence number. However, Bank One believes the flexibility for returning banks to indorse on the front of checks would create difficulties or risks in excess of any benefits it might create. Such indorsements may interfere with areas on the front of checks that are critical to security measures used by banks and check-writers. Bank One recommends that the Board include in the final rules or appendix D, provisions requiring a returning bank indorsement/identifier but not include the flexibility for them to indorse on the face of a check.

**The Board Requests Comment on all aspects of the proposed indorsement and identification standards....**

The quality and format of the bank of first deposit indorsement is critical to banks. Poor endorsement quality can result in late or incorrectly routed returns that ultimately put banks at risk of financial loss. Bank One strongly supports the proposed change to Section 229.35(a), whereby all indorsements, including depository bank endorsements, would be printed in black ink, a change from the current purple ink option. Bank One has found that the number of unreadable bank of first deposit indorsements is dramatically higher when we use an image-based system. We conducted an internal, two-day study, comparing a large sample of unreadable endorsement images to the endorsements on the original paper checks. We determined that 56% of unqualified returns were the result of indorsements in a color other than black (primarily purple) that could not be read on an image. Bank One is convinced that requiring black endorsements by the bank of first deposit will improve the return process both with substitute checks and with original checks.

Also in Section 229.35, the Board proposes to make the depository bank name and location optional, requiring only the 9-digit routing number. Bank One does not support this proposal. Frequently, digits within a bank's endorsement are unreadable or obscured by a subsequent bank endorsement. In such cases, banks use the bank name or city location to perform an on-line search to obtain the complete routing number. In fact, this is such a common problem that the outbound return software used by Bank One and many other banks was designed with a bank name search feature.

Bank One recognizes that not all banks currently comply with the name and location endorsement requirement, but eliminating the requirement will increase endorsements with routing number only and ultimately will increase errors and mis-sent items in the return system. At the least, Bank One suggests that if the Board were to make the depository bank name and location optional, it should only do so with respect to indorsements that are affixed electronically or digitally, rather than physically, as electronic or digital indorsements are less prone than physical ones to be illegible.

**The Board Requests Comment on whether an item that fails to meet any of the other substitute check requirements in § 229.2(zz) also should be treated as though it were a substitute check for those limited purposes.**

As discussed above and in the Industry Letter, Bank One is opposed to the Board's proposal that a "purported" substitute check would be created if the MICR line on the substitute check does not match the MICR line on the original check. Bank One believes the such items should have the legal equivalency to the original check, with the same warranty and indemnity rights as any substitute check.

Also, Bank One supports the Industry Letter comments pertaining to creation by the paying bank of a substitute check without MICR ink. We request that the final rule include a new provision that expressly authorizes a paying bank to create a legally

equivalent substitute check without printing the MICR line information in MICR ink. Once a check is paid and cancelled by the paying bank, there is no future need for processing either on a forward collection or return basis. Thus, these substitute checks, being created for delivery to the paying bank's drawer customers do not need to be printed in MICR ink. Customers will be indifferent (and will likely not know) whether or not a substitute check is printed in MICR ink as they do not use MICR readers. In fact, providing for the creation of non-MICR substitute checks will provide drawers certainty that a document that looks like a substitute check is a substitute check and is the legal equivalent of the original check.

**The Board specifically Requests Comment on whether using information from a check to create an ACH debit entry should be a payment request covered by this warranty.**

Bank One agrees with the position set forth in the Industry Letter and strongly recommends that the Check 21 Act Section 5(2) warranty not apply to a second debit that results from an ACH debit that is created with information from the original check or a substitute check. An ACH debit initiated with a check is not an "electronic version of the substitute check or original check" because the ACH debit represents a new payment transaction and is not a continuation of a check transaction. Moreover, inappropriate debits processed through the ACH network are already subject to the ACH rules and consumer protections applicable to electronic funds transfers.

**The Board Requests Comment on both of the adjustments relating to time period calculations.**

Bank One agrees that if a bank were to require a consumer's claim be in writing, the time period for acting on a claim should be computed from the date that the consumer submitted the written claim, even if the consumer previously provided some information relating to the claim in another form. Bank One also agrees that the appropriate term when referring to the time at which a bank must begin measuring the time period for action is "banking day" rather than "business day."

In addition, Bank One suggests the Board clarify when the time period for acting on a claim starts in the event a claim is submitted to a location other than the location specified by the bank. Section 229.54(b)(3) allows a bank to require the claim to be submitted in writing (or email). In the corresponding commentary, the Board states, "a bank that requires a recredit claim to be in writing should inform the consumer of that requirement and provide a location to which such a written claim should be sent." The commentary does not indicate whether or not and, if so, when, a bank is required to act on a recredit claim received at a location other than the one it specifies. Bank One believes that a claim should be deemed submitted only when received at the location specified and recommends that the Board clarify whether or not a bank that specifies the location to which a recredit claim should be sent must act on a claim sent to a different location, and if so, when the time period for acting on the claim starts.

**The Board Requests Comment on whether or not its proposed reorganization of the statutory provisions regarding action on claims is an improvement over the statutory organization and encourages commenters to provide specific organizational suggestions.**

Bank One supports the reorganization of the substantive requirements regarding a consumer's expedited recredit and agrees the reorganization is an improvement.

**The statute does not explicitly address the reversal of interest when reversing a recredit, and the Board specifically Requests Comment on whether the proposed approach is appropriate.**

Bank One supports the proposed rule, which would allow a bank to reverse both the amount it previously recredited, including any fees, plus any interest that it has paid on that amount if, after providing a recredit, a bank later determines that the consumer's claim is not valid. In addition, Bank One requests that the Board clarify the amount of the interest due a customer before the end of the 10<sup>th</sup> business day after the banking day on which the consumer submitted an expedited recredit claim (on which the bank has not taken action). Bank One believes the only interest required to be paid prior to a determination that a claim is valid, should be limited to interest due on the amount of the recredit.

**The Board Requests Comment on whether additional commentary to § 229.54 would be useful and, if so, what specific points should be covered.**

Bank One believes that additional commentary would not be useful.

**The Board specifically Requests Comment on which of these alternatives [for the timing of a case-by-case consumer disclosure] is preferable.**

Bank One agrees with the position set forth in the Industry Letter and recommends that the Board adopt the second alternative with a slight modification. Bank One believes that the final rule should state that, unless the bank already has provided the disclosure, a case-by-case disclosure is required at any time after the request up to and including the time the substitute check is delivered to the consumer.

**The Board Requests Comment on whether the proposed model disclosure [C-5A] is clear, accurate, and concise.**

Bank One agrees with the position set forth in the Industry Letter and strongly recommends that the Board adopt the sample disclosure submitted in the Industry Letter. Even if the Board were not to accept that language, Bank One urges the Board to reduce the length and complexity of the model notice in the final rule. We believe that rather than serve to educate consumers, such a long and complex notice will discourage consumers from reading it and confuse them if they do read it. A simpler more concise notice is more likely to catch the attention of consumers who will be advised of all their

rights by their financial institution at the time they allege a dispute in connection with a substitute check.

**In light of the absence of a statutory safe harbor, the Board specifically Requests Comment on whether providing model language for the § 229.54(e) notices is useful.**

Bank One agrees with the position set forth in the Industry Letter and supports the inclusion of these other model notices in the final rule. Bank One requests that the Board clarify, even without a statutory safe harbor, that, in the view of the Federal Reserve, use of the notices by a financial institution would constitute compliance with the Check 21 Act.

In addition to the above, Bank One recommends that the Board publish in appendix C, models for the notice a Bank may send out advising a consumer that not all the information required by Section 229.54(b)(2) of the proposed rule has been submitted and that the claim is not complete and cannot be processed until the remaining information is provided.

**The Board also Requests Comment on whether there are circumstances under which it would be appropriate to reduce the time frame for providing a notice of nonpayment.**

Currently, Section 229.30(c)(1) provides that the UCC or Regulation J deadline for return or notice of nonpayment may be extended when a paying bank uses a means of delivery that ordinarily would result in receipt by the receiving bank's next banking day. Bank One believes the current rule is preferable to the proposed rule, which would describe the applicable time of receipt to be the bank's cutoff hour for the next processing cycle. Changing the time as proposed would lead to uncertainty, as it would be difficult for a paying bank to determine the appropriate time.

**The Board Requests Comment generally on the desirability of [referring just generally to industry standards] and specifically on whether commenters would prefer that the Board identify specific industry standards within the text of the rule.**

Bank One agrees with the position set forth in the Industry Letter and strongly recommends that the final rule include only a reference to generally applicable industry standards in the rule text. However, Bank One recommends that the commentary not only identify the applicable standard, or standard-making body, but clarify that the Accredited Standards Committee (ASC) X9, Inc. standards are the only current generally applicable standards for substitute checks. Such a statement would provide certainty as to which standards might apply. This certainty is especially important with respect to substitute checks as they are new and still developing.

**The Board specifically Requests Comment on whether the proposed commentary is adequate with respect to the interaction between the Check 21 Act and existing law or whether commenters believe that additional discussion and examples are needed.**

**If the latter, the Board requests that commenters be as specific as possible in describing which provisions of the Check 21 Act need clarification with respect to which provisions of existing law, and in identifying examples that should be added to the commentary.**

#### Expedited Fed Recredit

Bank One agrees with the position set forth in the Industry Letter that only a breach of Check 21 Act warranties should be considered a precondition to expedited recredit and strongly recommends that the Board remove from the commentary the statement that a consumer may make an expedited recredit claim for a breach of UCC warranties with respect to a substitute check. The Check 21 Act was intended only to authorize the use and creation of substitute checks; instead, the proposed rule would extend the Check 21 Act remedies to non-Check 21 Act claims and would unnecessarily alter current check law.

#### Definitions

1. “Accounts and Customers” Under the UCC, an “account” includes “any” account and “customer” means “. . . person having an account with a bank . . . including a bank that maintains an account at another bank.” Under Section 229.2(a) of the proposed rule, “account” for purposes of subpart B and, in connection therewith, subpart A, will “. . . not include an account where the account holder is a bank . . .” and thus under Section 229.2(tt) a “customer,” which means a person with an account, will exclude inter-bank relationships.

Comment: Bank One requests clarification of the status of inter-bank correspondent accounts for purposes of Subparts A, B, C and D, and the status of a correspondent bank customer as a “customer” under the various parts of the Regulation.

2. “Truncation” means, in part, removing an original check from “forward collection,” defined in proposed rule Section 229.2(q) as being based upon handling of items on a “cash basis” for presentment to a paying bank. “Collecting bank” as defined in proposed rule Section 229.2(rr) defines any bank handling a check for forward collection, except the paying bank. Under the UCC, a “collecting bank” is any bank other than the paying bank, handling an item for collection. See UCC § 4-105(5). Collection is not limited to cash items.

Comment: The proposed Check 21 definitions will have the effect of limiting the circumstances to which a “substitute check” may be created to those involving the automated inter-bank collection of cash items, and thus exclude the prospect of truncation and the use of substitute checks in the process of handling items “for collection” or on a “collection” basis. Bank One believes that the practice of truncation and legal equivalence of substitute checks might promote improved trade collection practices in handling checks on a “collection” basis, and requests that the Board consider commenting on parties being able to agree to be bound by Check 21.

3. “Original Check” in Section 229.2 (ww) means the “first paper check . . . issued with respect to a particular payment transaction.”

Comment: The phrase “. . . the first paper check . . . issued with respect to a particular payment transaction . . .” suggests that multiple paper checks might be issued with respect to a transaction but that only the first check may be associated with a substitute check. Every original item processed as a cash item through the inter-bank system is amenable to a substitute counterpart. Furthermore, some of the items to be replicated by images are certain to be specious items, which were never “issued” in payment of any transaction. See UCC § 3-105 (a) (defining “issue”). Nevertheless, a specious items could be replicated by a substitute check. (Though generally unenforceable, the legal equivalence of such items is not necessarily worthless. For example, a paying bank could still be accountable for such items upon late return and endorsees of such items are liable thereon after dishonor. See UCC § 3-415(a).) Bank One suggests that the definition of “original check” relate a singular paper item to its substitute checks, such as:

“. . . the original paper item represented by a substitute check, as that terms is defined in sub-section 229.2(zz).”

4. The definition of a “sufficient copy” in Section 229.2(aaa) requires that it “accurately represents” the front and back of an original check at the time it was truncated.

Comment: Bank One requests that the Board provide guidance in the commentary on the meaning of “accurately represents,” and that “accurate” does not mean “enforceable,” which should be governed by other law including the UCC.

In the case of digital images, digital information will be attached to an image which identifies each bank in the collection and return stream by transit routing number, and identifies the bank’s status as a collecting, paying or returning bank, or as a bank of first deposit. This information should be deemed “accurate” even if the cosmetic appearance of the information is not identical to the image of the information on the original check. For example, if the electronic image of a check is made before the check is run through automated check processing equipment that sprays an endorsement stamp on the check, the image will have a digital data file attached that identifies the bank of first deposit by transit routing number, but will not bear the cosmetic image of the ink stamp on the back of the original item. Nevertheless, the inclusion of the name, identifier and status on the replacement document should be considered “accurate” because it does identify the bank of first deposit in conformity with Regulation CC, as amended.

In the case of faint marks on an original check which are indecipherable, an image also should be deemed “accurate” if the same material was also indecipherable.

5. Transfer and Consideration. Bank One agrees with the comments contained in the Industry Letter regarding “Transfers” and also observes that, under proposed rule

Section 229.2(bbb), the term has the meanings set forth in the UCC and in addition means “. . . delivery of the substitute check or other representation of the substitute check by a bank to a person other than a bank. . . .”

Comment: Under the UCC, “negotiation” means transfer of possession to a person who becomes a holder. See UCC § 3-201(a). A “holder” can enforce the negotiable instrument. See § 3-301. Because the substitute check is the legal equivalent of an original check, the “holder” of a substitute check must also be a person entitled to enforce the substitute check. Therefore, Bank One requests that the Board clarify in the commentary that “transfer” of an image of a check through electronic means to a person who converts the image to a substitute check constitutes the “transfer” required for purposes of negotiation under the UCC, by which that person becomes a holder.

### Obligation to Accept

The terms “accept” and “acceptance” appear frequently in the Board’s supplementary information relating to Check 21. See e.g. Supplementary Information: Background (“ . . . The New York Bank would be required to accept a substitute check that met all of the legal equivalence requirements.”) Under the UCC, “acceptance” means the signed engagement to pay a draft as presented. See UCC § 3-409(a). Under UCC § 3-410(a), a bank may vary the terms of its acceptance, but under Section 3-408, is not liable unless it “accepts.” Banks also retain the statutory and contractual right to refuse to accept any item for deposit to an account. The use of the word “accept” in Board materials relating to Check 21 should be examined in context, and the intent of obligations to accept clarified to mean that a bank must handle a substitute check in the process of forward collection, payment or return in the same fashion as it handles an original paper items, but otherwise retains its rights to refuse to accept an item for deposit and, if a paying bank, is not obliged to pay the item.

### Status of Substitute Checks as Legal Equivalents to Original Checks

When a substitute check is created, there will be at least two negotiable instruments in existence which are intended to have identical legal effect. Thus the original check is not legally superior to any related substitute check. Bank One suggests that the Board review the proposed regulation and commentary to remove any suggestion of bias in favor of an “original check” over the “substitute check” and clarify in its commentary that:

- a. A paying bank does not have any duty under Check 21 to treat the original check as superior to a related substitute check.
- b. A paying bank may pay an original check and related substitute check in any order in accordance with its payment procedures applied in good faith.
- c. In the absence of an agreement with its customer such as a “positive pay” arrangement, a paying bank is not obligated to inspect items to identify

and prevent duplicate payments based upon a substitute check and its related original check.

- d. A breach of the warranty given under 12 CFR 229.52(a)(2) does not occur until the occurrence of a duplicate payment. Thus, if a substitute check is the first item paid, the breach does not occur until later payment of the original check.
- e. The payment of a substitute check prior to the payment of the original check is not improper, because the substitute check is legally equivalent to the original and thus “properly payable.” See UCC § 4-401(a). The drawer has damages only upon the payment of the second item.

### Examples

The Board has also requested examples to add to its commentary regarding the interaction between Check 21 and existing law. Examples to illustrate the meaning of “legal equivalence” might include:

- A holder of a substitute check may enforce payment of a dishonored substitute check against the drawer. See UCC § 3-414(b).
- An endorsee of an original check is liable to pay a related substitute check upon dishonor of the substitute check. See UCC § 3-415(a).
- A drawer has a right to maintain a wrongful dishonor claim where a substitute check was not paid, but the bank has the right to determine the insufficiency of available funds in accordance with the UCC. See UCC § 4-402(a)-(c).
- A substitute check would constitute evidentiary proof of payment in a dispute between the drawer and the payee.
- A depository bank is obliged to make funds available in accordance with Sub-part B of Regulation CC upon the deposit of a substitute check created by its customer. See 12 CFR 229.12.
- Collecting and paying bank’s settlement obligations with respect to substitute checks are the same as those pertaining to original checks.
- A depository bank is obliged to accept the return of a substitute check, following dishonor. 12 CFR 229.32(a).
- Midnight deadline and 2 day/4 day deadlines in the forward collection and return of checks apply to substitute checks. 12 CFR 229.30.

- Notice of non-payment of substitute checks of \$2,500 or more is required, without regard to whether notice was given for the original check. 12 CFR 229.33(a).
- Priorities and preferences against insolvent banks under UCC § 4-216 and 12 CFR 229.39 are the same for original check and substitute checks.
- Security interests in the proceeds of substitute checks are the same as in the proceeds of the original check under UCC § 4-210.
- Depository banks' status and rights and obligations with respect to dishonored substitute checks are the same under UCC §§ 4-201, 4-202 and 4-214.

**The UCC revisions [regarding remotely created demand drafts] have been adopted in at least one state and introduced in at least three others. The Board Requests Comment on whether it would be appropriate to incorporate the UCC revisions into Regulation CC.**

Bank One agrees with and strongly supports the position set forth in the Industry letter. We strongly encourage the Board to establish new transfer and presentment warranties pertaining to demand drafts for all checks and not just consumer checks; however, we urge the Board to publish proposed language for comment before adopting a final rule.

**In addition to the above responses to the Board's specific requests for comment, Bank One has the following comments:**

#### Class Remedies

12 CFR 229.21 pertains to "Civil Liability." Class remedies are specified for violations of subpart B and in connection therewith, subpart A. Under Section 229.21(f), the Section does not apply to claims arising under subpart C, or to actions for wrongful dishonor. The proposed revisions fail to explicitly state that class remedies are not available under subpart D, including wrongful dishonor claims. Bank One requests the Board clarify that class remedies are not available.

#### Fraud and Mitigation of Loss

The proposed Regulation and commentary focus substantial attention on technological and processing issues associated with truncation, transmission of images and substitute checks. However, the proposed rule does not specifically address the potential for fraud

caused by the permissible existence of multiple equivalent obligations, or the systemic allocation of the risk of fraud among parties. In the case of consumer accounts, multiple payments might quickly deplete an account balance to the point of detection. However, corporate accounts, which have large balances, might be the more susceptible target for schemes to deposit original (or specious) items and then substitutes of those items. Furthermore, the ability to place an original check in the process of collection and to also place multiple substitute checks in the same collection stream poses substantial risk of fraud to banks in the forward collection, payment and return process, because the banks will be obligated to meet “same day” settlement rules with respect to all of these items. Bank One requests that the Board address these risks:

1. A claim against an insolvent bank for breach of the Section 229.52(a)(2) warranty should have a priority in FDIC resolution proceedings of an insolvent bank, consistent with priorities against the estates of failed depository, collecting, returning and paying banks under Section 229.39.
2. Bank One suggests that the Board include in its commentary an example that shows the interplay of the warranties and rights of a customer (which is not necessarily a consumer) and various banks with an interest in the original check and substitute checks.
3. A paying bank will not have knowledge of a breach of the warranty in Section 229.52(a)(2) until its customer advises it of a duplicate payment. Therefore, the breach of this warranty should be a defense under UCC § 4-302(b) to the paying bank’s “accountability” for the late return of the second item.

### Jurisdiction

Bank One suggests that the Board clarify that the one year time limit set forth in Section 229.56(c) is jurisdictional, and thus cannot tolled by agreement.

### Procedures for Making Claims For Expedited Recredit

Pursuant to the proposed rule Section 229.54(b), a consumer must submit to the bank within 40 calendar days of the later of the day on which the bank mailed or delivered, by a means agreed to by the consumer, (1) the periodic account statement containing information concerning the transaction giving rise to the claim or (2) the substitute check giving rise to the claim. Bank One suggests that the Board clarify that if the consumer fails to make a timely claim for expedited recredit, the consumer may still bring a claim that a duplicate payment was “improper” under UCC § 4-401, which is subject to a three year limitations period under UCC § 4-111.

### Notice of Nonpayment

Bank One requests that the Board clarify that for purposes of Subpart D of Regulation CC, transmission of an image of a substitute check or original check constitutes sufficient notice for purposes of the notice of nonpayment. Section 229.33 provides that the notice of return may be provided “by any reasonable means, including the returned check, a writing (including a copy of the check), telephone, Fedwire, telex, or other form of telegraph.” Bank One urges the Board to amend Section 229.33 to include in the list of reasonable means, an electronic or other representation of the check or substitute check.

### Allocation of Loss for Non-Survivable Security Features

As pointed out in the commentary, certain physical security features do not survive the imaging process. The Board has agreed that such features need not be captured in order to meet the accuracy requirement. Similarly, some security features use inks that disappear when copied or imaged or otherwise are not captured in the image process. The same can result from use of red ink or a gel pen. Bank One suggests the Board clarify in the commentary to Section 229.51(a) that these types of features similarly are not required to survive in order to meet the accuracy requirement.

Moreover, Bank One believes that the risk associated with items issued with such characteristics is best borne by the party creating that condition, the maker of the check. Therefore, Bank One suggests that the Board clarify in the commentary to Section 229.53(b)(2) or elsewhere in the final rule or commentary, that a maker of a check is precluded from making a claim pursuant to Sections 229.53 or 229.54, if the loss is a result of the condition of the check (including security features or ink used) at the time the check was issued.

In the event the Board is unwilling to make that clarification, Bank One would ask the Board to allocate the loss associated to the condition of the check at the time of issuance to the paying bank. Other than the maker of the check, the paying bank would be in the best position to prevent resulting losses. The paying bank could issue check specifications and contract provisions limiting or eliminating the use of such features.

### Intrabank Expedited Recredit Claim

Section 229.55 specifies that a bank can make a claim for expedited recredit if it has (i) received a claim for expedited recredit from a consumer or (ii) would have been subject to such a claim if the consumer account had been charged for the substitute check. It does not, however, address the situation in which a consumer’s account has been charged, but the Bank discovers it may be subject to a claim prior to the time the consumer has made a claim. Bank One recommends that the Board, in the commentary, clarify that a bank may pursue an interbank claim for expedited recredit if it discovers it may be

subject to a claim but no claim has been raised, even though it has already charged the consumer's account.

Time of Truncation

“Truncate” is not defined in the UCC. Under proposed rule Section 229.2(ccc), “Truncate means to remove an original check from the forward collection or return process and send to a recipient, in lieu of such original check, a substitute check or, . . . information relating to the original check . . .” Under Section 229.51(a)(1), the warranties given with respect to a substitute check include the warranty that the substitute check accurately represents all of the information on the front and back of the original check, “as of the time” it was truncated. Similarly, the definition of a “sufficient copy” in Section 229.2(aaa) refers to the “time” of truncation.

Comment: Bank One requests that the Board clarify the point in time when truncation occurs. The image of a check is likely to be captured early in a check processing operation, such as at a teller station or at an ATM. The image will not contain machine sprayed marks or manual marks applied during subsequent internal processes performed with the original check. Truncation should be determined at the time that the image for purpose of image replacement is made.

In summary, Bank One appreciates the opportunity to comment on the proposed rules. Bank One supports the proposed rule subject to the comments set forth above and in Industry Letter and the comment letters submitted by The Clearing House and by ECCHO.

If you have any questions about the foregoing comments, please contact the undersigned at 312-732-3560.

Very truly yours,

/s/ Molly Carpenter

Molly Carpenter